In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-202

ANNA DiMATTINA FORMERLY KNOWN AS ANNA ZAMPITELLA,
PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native of Ecuador who was ordered deported following her conviction for trafficking in cocaine, contends that the statutory scheme for discretionary relief from deportation unconstitutionally discriminates against natives of the Western Hemisphere.

Petitioner entered the United States as an immigrant on November 20, 1960. On October 9, 1970, she pleaded guilty to having distributed cocaine, in violation of 26 U.S.C. 4704(a) (since repealed).

At a deportation hearing on May 2, 1972 the immigration judge found petitioner deportable under Section 241 (a)(11) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251(a)(11), for having been convicted of a narcotic violation. Petitioner sought to apply for a waiver

of exclusion under Section 212(c) of the Act, 8 U.S.C. 1182(c),[1] but the immigration judge refused to accept the application on the ground that it could only be considered in conjunction with an application for adjustment of status under Section 245 of the Act, 8 U.S.C. 1255,[2] for which petitioner, as a Western Hemisphere native, is ineligible (8 U.S.C. 1255(c)). The Board of Immigration Appeals dismissed an appeal by petitioner on July 25, 1973 in a written order (Pet. App. 4a-6a). The court of appeals affirmed (Pet. App. 2a-3a).

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[1] 8 U.S.C. 1182(c) provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under Section 1181(b) of this title.

[2] 8 U.S.C. 1255 provides in part:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
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> (c) The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere, or of any adjacent island named in Section 1101(b)(5) of this title.

1. Petitioner contends that she is eligible to receive discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), even though she is not technically returning to the United States after a voluntary departure.[3] The discretionary waiver of exclusion provided for under Section 212(c) (8 U.S.C. 1182(c)) does not, however, apply to petitioner. It is, by its terms, available only to permanent residents aliens returning to the United States from abroad.

2. Even assuming *arguendo* that the statute applies to permanent residents aliens who have not left this country if they are eligible for an adjustment of status under Section 245 of the Act, 8 U.S.C. 1255, *Matter of Smith*, 11 I & N Dec. 325; *Arias-Uribe* v. *Immigration and Naturalization Service*, 466 F. 2d 1198, 1199 (C.A. 9), it is well established that Congress has the "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123; see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767, quoting with approval the opinion of Mr. Justice Frankfurter in *Galvan* v. *Press*, 347 U.S. 522.[4] Since Congress may exclude all

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[3]Petitioner's contention here was rejected by the Ninth Circuit in unreported orders in *Martin Rendon-Rojas* v. *Immigration and Naturalization Service*, No. 74-2264, decided September 27, 1974 and *Benjamin Rodriguez* v. *Immigration and Naturalization Service*, No. 74-2226, decided August 16, 1974.

[4]See also *Faustino* v. *Immigration and Naturalization Service*, 432 F. 2d 429 (C.A. 2), certiorari denied, 401 U.S. 921; *Ta'anoa* v. *Immigration and Naturalization Service*, 397 F. 2d 196 (C.A. 9); *Hitai* v. *Immigration and Naturalization Service*, 343 F. 2d 466, 467 (C.A. 2), certiorari denied, 382 U.S. 316; *Buckley* v. *Gibney*, 332 F. Supp. 790 (S.D. N.Y.), affirmed, 449 F. 2d 1305 (C.A. 2), certiorari denied, 405 U.S. 919.

aliens from the Western Hemisphere, it follows *a fortiori* that Congress may limit the discretion of the Attorney General with regard to relief from deportation orders for natives of the Western Hemisphere found guilty of a narcotics offense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[5]A similar issue is also raised in the petition for a writ of certiorari filed in *Dunn* v. *Immigration and Naturalization Service*, No. 74-321, a Ninth Circuit case.